14951

United States Court of Appeals

For the Ninth Circuit

ART JOHNSTON,

Appellant

vs.

HUGH EARLE, Collector of Internal Revenue, et al,

Appellee

Appeal from the United States District Court for the District of Oregon

APPELLANT'S BRIEF

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INDEX

TABLE OF AUTHORITIES

Cases Cited:

Texts Cited:

Statutes Cited:

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STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS OF JURISDICTION OF DISTRICT COURT AND THIS COURT

Facts Relating to Jurisdiction

This case is brought against the former Collector of Internal Revenue for the District of Oregon and certain of his deputy collectors for the recovery of damages resulting from the unauthor-

ized seizure of a certain tractor belonging to and in possession of a person against whom no tax was asserted. The defendants justify the seizure on the theory that the government had a valid lien against the property by virtue of an assessment against the former owner and further that they are immune from a claim for damages even if they had no lien on the theory that they were acting within the scope of their authority in making the seizure. The court held the deputies were acting within the scope of their authority even though the government had no lien and dismissed the action and plaintiff appeals. The Judgment of Dismissal was entered on June 21, 1955 (R. 43) and plaintiff's notice of appeal was filed July 21, 1955 (R. 44). This court has jurisdiction under Title 28, Section 1291 U.S.C.

Pleadings Relating to Jurisdiction

The pretrial order supercedes the pleadings (R. 36) and sets forth the matters in respect to jurisdiction of the District Court as follows:

Contentions of Plaintiff (R 20)

The court has jurisdiction of the subject of the action by virtue of:

a) The determination of a Federal Question under Title 28, Section 1331 USC.

b) Title 28, Section 1356 USC specifically grants exclusive jurisdiction to the Federal District Court in cases involving a seizure other than an admirality seizure.

c) Title 28, Section 1340 USC specifically, grants jurisdiction to the Federal District Courts to a cause arising under the revenue laws of the United States.

d) The cause is one arising under the laws and Constitution of the United States.

The Court entered its order respecting jurisdiction as follows: (R. 46, March 7, 1955.)

"that this court have jurisdiction to hear and determine said cause . . ."

Statement of Case

On May 29, 1946, Art Johnston (plaintiff) bought a tractor from one Earl L. Marshall (R. 20—Admitted Fact 4). Two years later the defendants seized the tractor over Johnston's protests (R. 20—Admitted Fact 5), claiming the right by virtue of unpaid taxes of Marshall (R. 18—Admitted Fact (1c) and (1d)).

Defendants admit they knew at the time of the seizure that Johnston had purchased the tractor and was in possession of it. (R. 20—Admitted Fact 5).

No defendant had any knowledge of whether they had any right to seize it, but all were acting under orders of defendant Shanks (Chief Deputy) who admits he had no knowledge of whether or not the Government had any right to seize the tractor but was too busy to handle the matter personally. (R. 65-66-78-90-94.)

Johnston filed suit against the United States under the tort claims act. The Government defended by claiming a lien against the tractor. The trial Judge (Hon. James Alger Fee) held against the Government in his opinion but later dismissed the suit as not being properly included under the tort claims act.

Plaintiff then brought his action against defendants individually. Defendants each admit they had no belief in the existence of a lien, but were merely acting on orders. (R. 65-66-78-94.) In addition, two Deputy U. S. Atttorneys testified that

the officers were told prior to the seizure that they had no right to make the seizure (R. 57) - (R. 103-4).

Again, defendants attempted to justify under a claim that the Government had a valid lien against the property under a claim against the former owner. However, defendants failed to introduce any proof of any lien on the tractor. In fact, the evidence proved the tractor was never in the county where the lien was filed.

However, the court (Hon Claude McCulloch) held that even though the Government did not have a right to make the seizure that the officers were acting within the scope of their authority as federal officers and hence under the doctrine of sovereign immunity, they could not be held liable to plaintiff in damages (R-42 — Findings 6).

Plaintiff objected to the finding (R. 37) and contended defendants' authority was limited by statute and that they had no authority to make a seizure of the property of a stranger unless the Government had a valid lien on the tractor (Title 26, Section 3692). Since there was no valid lien on the

tractor, the seizure was beyond the officers' jurisdiction and was without authority.

Plaintiff appeals from the judgment based on the findings of fact that defendants were acting within the scope of their authority in taking the tractor from plaintiff's possession (R 44).

Summary of Argument

Plaintiff's argument may be summarized by stating that where the authority of Federal officers (Deputy Collector's of Internal Revenue) is limited by statute that such limitation determines the scope of their authority and that they had no implied authority beyond the limitation and that where the seizure is made without such authority, the officers are personally liable for the damages caused by the unlawful seizure and are not immune under the doctrine of sovereign immunity.

The scope of authority of Federal officers whether by statute or by implication can never be greater than the constitutional limitation and no constitutional authority could be granted to any

officer which would permit the taking of one person's property for payment of another's tax liability and hence no such authority could be implied whether limited by statute or not.

When the constitutional power of the sovereign is exceeded then the sovereign itself has no immunity and neither does the officer who acts in its behalf.

The doctrine of immunity is based upon the assumption that the officer's act is that of the sovereign *so long as the officer acts within the scope of his general or special statutory authority,* and since the sovereign is immune in the exercise of its constitutional powers so is the officer who acts in its behalf *so long as he confines himself to the delegated authority.*

Plaintiff simply contends that defendants had no authority except that granted by statute and where the defendants' statutory authority was exceeded, they would be liable to plaintiff in damages which were undisputed and that judgment should have been entered accordingly.

SPECIFICATION OF ERROR No. 1

The Court erred in Entering a Finding of Fact that Defendant officers were acting within the Scope of Their Authority in Taking the Tractor from Plaintiff's possession and in overruling Plaintiff's objection thereto and in Entering Judgment based thereon.

Argument

In this case, the Government asserted a tax liability against a taxpayer by the name of Earl Marshall (R. 18). There was no claim of tax liability against the plaintiff (R. 19 - (2c)). It is admitted that the property (tractor) which was seized by defendants was seized by virtue of the tax liability owed by Marshall (R 20-(5)). It is also admitted that the property was owned by the plaintiff Johnston as purchaser from Marshall (R. 20-(4)). It was admitted that the property was in the possession of the plaintiff and not Marshall at the time of the seizure, (R 20-(5)), and it was further admitted that defendants took the property over Johnston's opposition, and that on previous occasions he had notified them that they had no claim (R. 68).

It appears that at least two Deputy U. S. At-

torneys had advised the Internal Revenue agents that they had no right to touch the property, (R 57-103-104) and it further appears that this advice was given to them prior to the seizure (R. 57).

There was no proof of a valid warrant ever having been issued (R. 19-2 (c) (1).)

On trial in the first action against the United States, and in this action as well, the defendants relied on the fact that the Government had a valid lien on the property at the time of the seizure which they then claimed was prior to the interest of Johnston. They based this claim on the fact that the tractor was located in the county where the lien was filed prior to Johnston's (plaintiff's) purchase thereof.

Defendants each admitted that they had no information as to whether or not the government had such a lien (R. 65-78-94-95).

Defendants Curran and Borthwick testified they merely acted on order of their superior (R. 65-78). Shanks testified that he ordered the seizure

but he had no reason to believe the government had any lien on the property (R. 86-87, 93-94-95).

The sole justification of Shanks is that after 1945 the Collector's office expanded its force and he was no longer able to personally handle the seizures (R. 90).

Earle testified to having no knowledge of anything. He was the Collector. His liability is derivitavely asserted under Title 26, Section 3654 U.S.C. (See page 26 this Brief.)

The ownership and possession of the tractor by plaintiff and seizure by defendants being admitted, the burden of proving a valid seizure was upon the defendants.

Burden of Proof After Seizure

> "When the defendant officers have seized property in the plaintiff's possession either as plaintiff's or as that of a third person, the burden of proof is upon the officer to sustain his action and if he fails to do so it is immaterial whether or not plaintiff has title. The officer must show 1) seizure under valid process; 2) show he did not abandon his lien (if any) by failing to keep pos-

session or failing to take whatever further steps were necessary to keep it alive; 3) if his process ran against a third person that he had title to the property; and 4) that the property was not exempt from such seizure. 150 ALR 239.

"Where defendants fail to introduce any evidence of such justification, they are liable as failing to sustain the burden of proof."

It is conceded that the only way defendants could justify the seizure was by proving a valid lien (R. 95). The only way they could prove a valid lien was to prove that the tractor was located in Lane County where the lien was filed (Title 26, Section 3672 (a) (1) U.S.C. - 87.805 Oregon Revised Statutes). (See Appendix, p. 28.)

The narrow question therefore was whether or not the tractor was in Lane County between the date of filing the lien and the date of Johnston's purchase. Defendants failed to produce any evidence of its location at any time while plaintiff's evidence proved it was not in Lane County during that time or any other time. The court properly holds that the officers made a "mistake" of fact in believing the tractor was in Lane County (addi-

tional memorandum of decision — original form — not printed).

The court held, however, that even though the seizure was wrongful that the officers were acting within the scope of their authority and were, therefore, not liable for their "mistake of fact" in regard to the location of the tractor (Memorandum of Decision and additional memorandum — original form — not printed.)

The question on appeal therefore is:

Was the trial Court in error in holding that:

> *"Defendants were acting within the scope of authority in seizing plaintiff's property?"*

The scope of authority rule relied on by the court is stated on the Court's opinion as follows:

> *"Public officials acting 'within the scope of their authority' are immune from personal liability for a mistake of fact."*

Citing:

Gregoire v. Biddle, 177 F. 2nd 579, and *Pacific Telephone & Telegraph Co. v. White,* 104 F. 2d 923,

Nelson v. West African Line, 86 F. 2d 730 (Memorandum of Decision — original form — not printed.)

Plaintiff contends the rule or cases cited do not apply to the present facts. Defendants' scope of authority was limited by statute and defendants did exceed that statutory authority. The cases cited by the Court apply only to judicial officers (See Annotation — 28 A.L.R. 2d, 650). Plaintiff also contends that there can not be a "Mistake of Fact" unless there is a "belief" that such fact exists. Defendants each testified they were acting only on orders and knew nothing of the location of the tractor or the existence of a lien. Therefore they could not have had a belief in any fact.

The officers' scope of authority could not be enlarged beyond the jurisdiction constitutionally granted by statute. *Busey vs. Deshler Hotel Co.,* 130 F. 2d 187. The statute restricts a Deputy Collector to the seizure of property of the taxpayer *or property on which a valid lien exists;* and then only by valid warrant.

Title 26, Section 3692 U.S.C. states (insofar as applicable):

> "In case of neglect or refusal . . . the collector may levy or *by warrant* may authorize a deputy collector to levy upon all property . . . belonging to such person, *or on which the lien . . . exists,* for payment of the sum due . . ."

Statutes delegating powers to public officers must be strictly construed. *U. S. v. Foster,* 131 F. 2d 3, *Yearsley v. W. A. Ross Const. Co.,* 309 U.S. 21.

Having admittedly seized property belonging to a person other than the taxpayer, Deputy Collectors could justify only by acting under a valid warrant regular on its face and directed to the distraining officers to seize specifically the property in question, and then only on the theory that the Government had a valid lien on the property.

The warrant under which defendants claimed to have acted (Warrant No. 65544 (R. 20 item 5) (exhibit No. 11 — original form — not printed) did not describe the property in question in any way. It was not issued by a collector then in office, but

was issued by a former collector (R. 19-2 (c) (1)), and was not regular on its face because it had not been returned within the time limited from its issue date.

The so-called "scope of authority" rule does not extend to every seizure made by an officer purporting to act in his official capacity. The cases cited by the court were limited to judicial officers. (See Note — 28 A.L.R. 2nd 650.)

The scope of authority of an officer can not be extended beyond the Constitutional limitations either by implication of or by statute. It is fundamental that had the statute authorized the seizure of one person's property for payment of another's liabilities, it would be an unconstitutional delegation of authority under the Fifth Amendment to the Constitution of the United States.

> "No person shall . . . be deprived of . . . property without due process of law . . ."

It follows, that when defendants did seize the plaintiff's property for application to the taxes of

Marshall the court could not properly justify the seizure by claiming it was within their implied powers, and it clearly was not within their statutory powers (Title 26, Section 3692, U.S.C.). (P. 14.)

In *U. S. v. Lee,* 106 U.S. 196, it was said:

> "Not only is no such power given, but it is absolutely prohibited both to the executive and the legislature to deprive anyone of life, liberty or property without due process of law, or to take property without just compensation."

Where officers levy upon property which is specifically identified in the writ even though the seized property later turns out to belong to a third person, they, of course, are protected; compliance with the writ is considered "due process." Under those circumstances, the mistake is based upon an erroneous but bona fide "belief" that that the ownership of the property is in another, the officer actually making the levy is protected by his writ where he takes the property described therein and he has no actual notice of any irregularity.

In this case, no defendant testified he believed the property belonged to the person named in the

warrant. In fact they all testified they knew it belonged to Johnston.

A writ commanding a sheriff to levy upon and attach personal property belonging to one named in it without description does not authorize him to seize the property of another and if he does so, he becomes as a trespasser and is unprotected by the law. This is the Federal rule, *North v. Peters,* 138 U.S. 271; *Buck v. Colbath,* 3 Wall 334, and this is also the rule in Oregon. In Oregon, the officers are liable whether or not they have acted in good faith. *Sabin v. Chrisman,* 90 Ore. 85, 175 Pac. 622. *Industrial Chrome Plating v. North,* 175 Ore. 351, 153 P. 2d 835. Good faith is immaterial under the Federal Rule, also, *Dallas County v. McKenzie,* 94 U.S. 660.

In *Land v. Dollar,* 330 U.S. 738, it was said:

> "But public officials may become tort feasors by exceeding the limits of their authority and when they unlawfully seize or hold a citizen's realty or chattels . . ."

The scope of authority granted to Deputy Collectors of Internal Revenue to distrain property is

limited by statute to cases where a valid warrant of distraint is charged out to them. (Title 26, 3692 U.S.C.). (See page 14 this Brief.)

In this case, the warrant under which defendants operated was not issued by the Collector in office but was issued by a former collector. (See admitted facts pre trial order 2 (a) and 2 (c) (1) R. 19.)

The warrant was dated almost three years earlier (October 17, 1945) and by its terms was required to be returned within 90 days after its date and hence it had expired by its own terms (Ex. 11 not printed) and was therefore not "regular on its face."

Requirements of Warrant

A warrant must be regular on its face and authorize the taking of specific property to protect an officer from liability for seizure of property of a third person and a writ that is void on its face is no protection to the officer who executes it.

47 Am. Jur. 860;

Buck v. Colbath, 3 Wall 334.

The warrant directed the officers designated to make a seizure of the property of Marshall, or any property on which the Government held a valid lien. Johnston's name did not appear on the writ. (Finding of Fact 2 (c) (R. 40).

Even if the warrant had been valid, it gave no authority to seize the property of Johnston. As held in *Buck v. Colbath,* 3 Wall 334. (See also 47 Am. Jur. 962 Sec. 206.)

> "An officer who is directed to levy an attachment upon the property of a person without describing any specific property must exercise his judgment and discretion in determining whether the property upon which he proposes to levy belongs to such person, whether it is such as to be subject to be taken under the writ, and as to the quantity to be taken, and he is legally responsible to any person injured for the consequences of any error therein."

The rule seems clear that where specific property is identified in the writ, and the officer seizes the property described, he is protected even if it later turns out the property belongs to another, but where no property is identified in the writ, the officer seizes the property at his peril.

Even if the writ was valid, the defendant officers must prove they had a bona fide belief that they were seizing under a valid lien since they were admittedly seizing it in the hands of a third person who did not owe the debt.

Defendant Borthwick testified (R. 65):

"Q. Did you know where the tractor was located on October 20, 1945, when the lien was filed?

"A. I have no knowledge of that sir.

"Q. Did you have any knowledge whether there was a lien on the tractor, a valid lien?

"A. I can't remember. That has been a long time ago. The usual procedure in the District was to file a lien in connection with any warrant for distraint which was issued in any sizeable amount. I don't remember what that amount was.

"Q. When you go out to take a piece of equipment on orders from your superior, would you just take your orders or would you check to see if there is a valid lien and so forth?

"A. We just take orders.

"Q. Ordinarily, you would not know whether there was a lien or not?

"A. That is right."

And on page 68 (R. 68):

"Q. You knew then, I take it from your answer that Mr. Johnston was claiming that the government did not have the right to take it, is that correct?

"A. Yes. Mr. Johnston told me that.

"Q. So when you went out there you knew Mr. Johnston was definitely opposed to the government taking it?

"A. I had plenty of reason to think that, Mr. Erwin.

Defendant Curran testtified as follows (R. 78):

"Q. Did you have a warrant with you?

"A. No Sir.

"Q. Did you have any knowledge of such a warrant?

"A. I knew that there was a warrant, yes.

"Q. Did you know against whom it ran?

"A. Yes.

"Q. Who was that?

"A. Mr. Marshall.

"Q. Did you have any knowledge of your own as to whether this tractor was located on October 20, 1945?

"A. No.

"Q. Did you have any knowledge whether you had a valid lien on the tractor or not?

"A. No, that did not concern me. I was just following orders as given to me by Mr. Ellison.

"Q. Ordinarily when you go out to seize something, do you have knowledge of the lien being valid or not?

"A. If a warrant were assigned to me, I would be sure of that first.

"Q. But when you are ordered to take it, you just do that?

"A. That is correct."

Defendant Shanks testified (R. 93) as follows:

"Q. At that time did you have any knowledge of your own as to where the tractor was located at the time the lien was filed?

"A. No. I never had knowledge of where property is located. As I told you, it is automatic procedure . . ."

And on page 95 (R. 95):

"Q. In order to have a valid lien on it as to a purchaser for value, the object or article involved must have been located in the county where the lien is filed, at the time the lien is filed?

"A. That is right. That is what I said.

"Q. My position in that regard is this: At the time you seized it you have no knowledge as to whether or not the tractor was in Lane County or was not in Lane County, at the time the lien was filed.

"A. I had no knowledge; that is right.

"Q. None whatsoever.

"A. That is right . . ."

Mr. Hamilton, a former Deputy U. S. Attorney, testified as follows: (R. 57)

"Q. Did you ask them (officers of Bureau of Internal Revenue) if they had any evidence, to bring in any evidence they might have as to the validity of any lien they might have claimed?

"A. I don't know that I did at that time. They told me what the facts were, as they knew them, and I said that in my opinion the seizure would be illegal.

"Q. Do you recall whether or not that was based on the fact that they did not have evidence of a valid lien?

"A. That is right. They couldn't put the tractor in the county where the lien was filed as I recall."

Mr. Twining, a former Assistant U. S. Attorney testified as follows: (R. 103-104)

"A. . . . At that time, I was not satisfied at all that I had any business to proceed with that nature of action, and I refused to do it. I am sure of that, recalling telling them (Officers of the Bureau of Internal Revenue), however, that if they would bring in some evidence that that condition existed . . . I

think the issue was whether or not that equipment had ever been in one or the other of Marion or Lane Counties.

"At that time it was oral conversation in my office with two agents. I had no proof that there was a lien and for that reason did not bring the process.

"Q. Your recollection is that you asked them to bring in evidence?

"A. I gave my reasons for it, and I said 'I have nothing before me, no way of telling; it is assumption with me; at this moment, I do not like to take this serious move until I have some basis to support the lien date.' That is the way I left it.

"Q. Your recollection is that they were claiming a lien against the tractor?

"A. Yes, that was the basis upon which they resented his taking the equipment."

It should be added that the Collector of Internal Revenue is liable for the acts of his deputies. The Court was in error in its memorandum decision (original form — not printed) in stating that: "Earle (Collector) would not be liable in any event."

Title 26, Section 3654 (under 1954 Code no comparable section) provides (insofar as applicable):

> "General Powers and duties relating to Collector.
>
> a) . . .
>
> b) Deputy collectors; . . . but each collector shall in every respect be responsible, both to the United States and to individuals as the case may be, for every act done or neglected to be done by any of his deputies while acting as such."

CONCLUSION

The court erred in overruling plaintiff's objections to Findings of Fact Number 6, reading as follows:

> *"Defendants were each Federal Officers acting within the scope of their authority in taking the tractor from plaintiff's possession."*

and in entering judgment based thereon.

Defendants exceeded the authority granted to them by statute and failed to justify their actions

and as such become trespassers liable to plaintiff for conversion of this property.

The finding was in error and since the judgment is solely based on this finding, the judgment should be reversed with directions to enter judgment in favor of plaintiff and against defendants and each of them in the sum of $15,000.00 together with plaintiff's costs and disbursements incurred herein.

Respectfully submitted,

Warde H. Erwin,

Barzee, Leedy & Erwin

APPENDIX

Title 26, Section 3670 U.S.C.

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property whether real or personal, belonging to said person."

Title 26, Section 3672 U.S.C.

"(a) Invalidity of lien without notice.

"Such lien shall not be valid as against any . . . purchaser . . . until notice thereof has been filed by the collector . . .

"(1) Under State or Territorial laws.

"In the office in which the filing of notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, wherever the State or Territory has by law authorized the filing of such notice of an office within the State or Territory."

The State of Oregon has authorized the filing as follows:

Section 87.805 Oregon Revised Statutes, Uniform Federal Tax Lien Registration Act.

"Federal tax lien registration filing of notice of lien and certificate of discharge.

"Notices of liens for taxes payable to the United States of America . . . shall be filed in the offices of the recorder of conveyances in counties which have a recorder of conveyances, and in other counties in the offices of County Clerks for the county or counties of this state within which the property subject to the lien is situated."